United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

Nos. 21,311 - 21, 314

DISTRICT OF COLUMBIA,

Appellant,

v.

MARION S. BARRY, JR., et al.,

Appellees.

On Certification From The District Of Columbia
Court Of General Sessions Pursuant To
D. C. Code, 1961, Section 23-102

BRIEF FOR THE DISTRICT OF COLUMBIA

PRELIMINARY STATEMENT

By informations filed in the Criminal Division of the Court of General Sessions, appellees were charged with disorderly conduct in violation of § 22-1107, D. C. Code, 1961. In the course of the preliminary proceedings the authority of the Corporation Counsel to prosecute the offense was challenged. For this reason, the Court of General Sessions, acting pursuant to § 23-102, D. C. Code, 1961, certified to this Court the question whether the Corporation Counsel or the United

States Attorney for the District of Columbia is the proper prosecuting authority for violations of § 22-1107, D. C. Code, 1961.

ARGUMENT

Prosecutions of the offense of disorderly conduct proscribed by § 22-1107, D.C. Code, 1961, should be conducted by the Corporation Counsel.

On July 29, 1892, Congress passed "An Act for the preservation of public peace and the protection of property within the District of Columbia," 27 Stat. 322, ch. 320 (hereinafter referred to as the 1892 Act).

The first seventeen sections of this Act made unlawful a number of more or less unrelated actions, including destroying or defacing public and private buildings and other property; throwing stones or missiles in the street; flying kites; using profane, indecent and obscene language in public; congregating in public places and engaging in loud and boisterous talking; addressing a person for the purpose of prostitution; being a vagrant; indecent exposure; urging dogs to fight or bite persons or animals; molesting or disturbing religious congregations; driving or riding a horse in excess of eight miles per hour; destroying or injuring trees on public space; tying a horse to a tree;

setting a fire in the streets; destroying or injuring United States or District of Columbia property; driving or leading animals on footpaths; and playing ball games in the streets.

Section 18 of the 1892 Act, still in full force and effect, § 22-109, D. C. Code, 1961, provides in pertinent part:

> "That all prosecutions for violations of any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name and for the benefit of the District of Columbia, and in the same manner as now provided by law for the prosecution of offenses against the laws and ordinances of the said District."

The origin of the offense of disorderly conduct, with which this Court is now concerned, may be traced to Sections 5 and 6 of the 1892 Act.[1] As originally proscribed, the offense carried with it a fine of $25. In 1898, Sections 5 and 6 of the 1892 Act were amended in certain particulars not here pertinent and merged into a single section, but the $25 penalty remained unchanged. (30 Stat. 723.) The only other amendment to Sections 5 and 6 of the 1892 Act occurred in 1953 when Congress increased the penalty from a fine of $25 to a fine of $250 or imprisonment of not more than ninety days, or both. The offense as

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[1] These sections are set forth in the Appendix.

it now appears in § 22-1107, D. C. Code, 1961, has been consistently prosecuted by the Corporation Counsel throughout the years.

It is a well known rule of statutory construction that "long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubtful statute." Sutherland, Statutory Construction, Section 5103, 3d Ed. (1943), Vol. 2, Horack.

In suggesting that the Corporation Counsel no longer has authority to prosecute violations of § 22-1107, reliance has been placed on Section 932 of "An Act to establish a code of laws for the District of Columbia," approved March 3, 1901, 31 Stat. 1338, as amended (§ 23-101, D. C. Code, 1961), which provides in pertinent part:

> "Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants."

See dictum in Smith v. District of Columbia, ____U. S. App. D. C. ___, ____F. 2d ____ (No. 20,279, decided July 27, 1967).

Clearly, however, such a general provision does not have the effect of impliedly repealing or vitiating the authority of the Corporation Counsel to prosecute the offense of disorderly conduct conferred by the specific terms of Section 18 of the 1892 Act. It is a cardinal rule of statutory construction that repeals by implication are not favored. Only when two statutes are in irreconcilable conflict can it be said that one impliedly repeals the other. Equally settled is the rule of statutory construction that a general statute does not repeal a previously enacted specific statute unless the two enactments are hopelessly inconsistent. Thus, in Washington Ry. & Electric Co. v. District of Columbia, 56 App. D. C. 134, 136, 10 F. 2d 999, this Court said:

> "It is a well-established rule that repeals by implication are not favored, and that a general statute, without negative words, will not repeal the particular provisions of a former statute, unless the two acts are irreconcilably inconsistent. * * *"

And in Simon v. Simon, 58 App. D. C. 158, 160, 26 F. 2d 530, this Court said:

> "It is a canon of statutory construction that, where there is an earlier special statute and a later general statute, the

> terms of the later being broad enough to include the matter provided for in the former, the special statute must be considered as an exception to the general statute. * * *"

These principles apply here. A comparison of Section 18 of the 1892 Act with § 23-101, D. C. Code, 1961, which delineates the general prosecutorial authority of the United States Attorney and the Corporation Counsel, will make it abundantly clear that these two statutes are easily reconciled, with the result that the former continues to clothe the Corporation Counsel with undiminished authority to prosecute violations of § 22-1107, supra.

The position of the District of Columbia may be further illustrated by a comparison of the instant case with this Court's holding in United States v. Strothers, 97 U. S. App. D. C. 63, 228 F. 2d 34. In Strothers, the question presented was whether the United States Attorney for the District of Columbia or the Corporation Counsel was the proper prosecuting authority for the offense of soliciting for prostitution, which was originally proscribed by Section 7 of the 1892 Act. From the date of the passage of the 1892 Act until October 15, 1935, the Corporation Counsel prosecuted the offense of soliciting for prostitution under Section 18 of the 1892 Act. On October 15, 1935, the President signed

into law an Act entitled "An Act for the suppression of prostitution in the District of Columbia," 49 Stat. 651, in which the scope of the soliciting offense was broadened and in which it is specifically provided that:

> "Section 7 of the Act of Congress entitled 'An Act for the preservation of the public peace and the protection of property within the District of Columbia,' approved July 29, 1892, is hereby repealed."

This Court, accordingly, held that the United States Attorney rather than the Corporation Counsel possessed authority to prosecute the soliciting offense proscribed by the 1935 Act. This Court said (97 U. S. App. D. C. at 66):

> "If, therefore, Section 7 was in fact repealed, as we hold it was, as distinguished from amended, it is obvious that Section 23-101, D. C. Code, 1951, applies. * * *" [Emphasis by the Court.]

In contradistinction to Strothers, the provisions of § 22-1107 have never been repealed but merely amended. This circumstance, as Strothers inferentially makes clear, is not a sufficient basis upon which to predicate a transfer of prosecutorial authority from the Corporation Counsel to the United States Attorney.

Appellant is not unmindful of this Court's holding in District of Columbia v. Moody, 113 U. S. App. D. C. 67, 304 F. 2d 943 (1962). In Moody, this Court, in a short per curiam opinion citing Strothers, supra, as controlling, concluded that the offense of destroying private property created by Section 1 of the 1892 Act, as amended (§ 22-3112, D. C. Code, 1961), was prosecutable by the United States Attorney for the District of Columbia rather than by the Corporation Counsel. The fact is, however, that the section of the 1892 Act creating the offense of destroying private property, unlike the section involved in Strothers, had never been repealed, but merely amended to increase the penalty. Under these circumstances, appellant submits, Strothers does not justify the result reached in Moody. In appellant's view, the question presented in Moody was incorrectly decided. However, it is not necessary for this Court to overrule Moody in order to conclude that violations of § 22-1107, supra, should be prosecuted by the Corporation Counsel rather than by the United States Attorney. As will be demonstrated, the legislative history of the disorderly conduct offense here involved differs substantially from that of the offense of destroying private property involved in Moody.

As previously mentioned, the disorderly conduct offense in question was punishable by a fine of $25 until 1953, when, as a result

of certain amendments, the penalty was increased to a $250 fine, 90 days imprisonment, or both. Prior to 1953, the Corporation Counsel unquestionably had authority to prosecute this offense under Section 18 of the 1892 Act. Appellant submits that, instead of vitiating the Corporation Counsel's authority to prosecute this offense, Congress, by its 1953 amendments, made it crystal clear that such authority was to continue undiminished. Thus, on the same day it increased the penalty applicable to disorderly conduct under § 22-1107, Congress proscribed the additional kinds of disorderly conduct contained in § 22-1121, D. C. Code, 1961. As is plain from the legislative history of the 1953 amendments, Congress intended to strengthen the existing disorderly conduct laws by creating a more comprehensive statutory scheme similar to that existing in the State of New York. See House of Representatives Report No. 514, 83d Cong., 1st Sess., pp. 8, 9.

Consistent with increasing the penalty applicable to § 22-1107, Congress also made the disorderly conduct proscribed by § 22-1121 punishable by a fine of not more than $250, or imprisonment for not more than 90 days, or both. Notwithstanding this penalty, Congress then specifically provided that prosecutions of § 22-1121 shall be conducted in the name of and for the benefit of the District of Columbia

(67 Stat. 98). It is not without significance that Congress did so by amending Section 18 of the 1892 Act, the very provision which appellant contends should control here. All doubt concerning the authority of the Corporation Counsel to prosecute both kinds of disorderly conduct, whether under § 22-1107 or under § 22-1121, was laid to rest by the legislative history of the 1953 disorderly conduct amendments. Thus, after noting that the "punishment by imprisonment" added to § 22-1107 was "entirely new," the report of the House District Committee went on to state its enforcement proposals for its revamped disorderly conduct offenses as follows:

> "Section 211(b) * * * [of the District of Columbia Law Enforcement Act of 1953] amends section 18 of the act of July 29, 1892 (D. C. Code, sec. 22-109), so as to provide that violations of the new section 211 shall be prosecuted in the name of the District * * *." Reports and Documents Relating to D. C., 83d Cong., 1953-54, p. 9.

In short, it is utterly inconceivable that Congress would proscribe new kinds of disorderly conduct, punishable by a fine, imprisonment, or both, and specifically authorize the Corporation Counsel to prosecute offenses thereunder, and, on the same day, increase the penalty for the existing kinds of disorderly conduct to a fine, imprison-

ment, or both, and not intend that the Corporation Counsel be the prosecuting officer for both offenses. Whatever may be said concerning the offense of destroying private property, therefore, a consideration of the statutes proscribing disorderly conduct in their totality, together with supporting legislative history, will render inescapable the conclusion that the Corporation Counsel is the proper prosecuting authority for violations of § 22-1107, D. C. Code, 1961.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the offense of disorderly conduct in violation of § 22-1107, D. C. Code, 1961, should continue to be prosecuted by the Corporation Counsel for the District of Columbia.

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APPENDIX

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STATUTE INVOLVED

Act for the preservation of the public peace and the protection of property within the District of Columbia. Approved July 29, 1892, 27 Stat. 322, ch. 320.

* * *

Sec. 5. That it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or any indecent or obscene words, or engage in any disorderly conduct in any street, avenue, public space, square, road, or highway, or at any railroad depot or steamboat landing within the District of Columbia, or in any place wherefrom the same may be heard in any such street, avenue, alley, public square, road, highway, or in any such depot, railroad cars, or on board any steamboat, under a penalty of not exceeding twenty dollars for each and every such offense.

Sec. 6. That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble at the corners of any of the streets or avenues, or in any street, avenue, or alley, road, or highway, or on the foot pavements or flag footways of any street or avenue, or at the entrance or on the steps, cellar doors, porches, or porticos of any public or private building or office, or at the entrance of any public or private building or office, or at the entrance, or in, on, or around any of the inclosures of the Capitol, Executive Mansion, public squares, District buildings, Judiciary square, or at the entrance of any church, schoolhouse, theater, or any assembly room, or in or around the same or any other public or private inclosure within the said District, and be engaged in

loud or boisterous talking, or to insult or make rude or obscene comments or remarks or observations on persons passing by the same, or in their hearing, or to so crowd, obstruct, or incommode the said foot pavement or flag footway, or the entrance into or out of any such church, public or private dwelling, city hall, Executive Mansion, Capitol, or such public inclosure, square or alley, highway or road, as to prevent the free and uninterrupted passage thereof, under a penalty of not more than twenty-five dollars for each and every such offense.

* * *

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BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Nos. 21, 311-[redacted] 12, 13 and 14

DISTRICT OF COLUMBIA,

Appellant

v.

MARION S. BARRY, JR., et al.,

Appellees

On Certification From the District of Columbia Court of General Sessions, Pursuant to D. C. Code, 1961, §23-102

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QUESTION PRESENTED

Whether a prosecution for violation of D.C. Code, 1961, "§22-1107. Unlawful assembly--Profane and indecent language," shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants, or shall be conducted in the name of the United States and by the attornry of the United States for the District of Columbia or his assistants?

INDEX AND TABLE OF CASES

STATUTORY PROVISIONS INVOLVED

STATUTES INVOLVED

"An Act to establish a code of law for the District of Columbia. Approved March 3, 1901, 31 Stat. 1189, ch.854; D.C. Code 1961, Section 49-301.

SECTION I. The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provisions of this code. (Emphasis added.)

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Nos. 21, 311-21, 314

DISTRICT OF COLUMBIA,

Appellant,

v.

MARION S. BARRY, JR., et al.

On Certification from the District of Columbia
Court of General Sessions, Pursuant to
D.C. Code, 1961, Section 23-102

BRIEF FOR APPELLEES

PRELIMINARY STATEMENT

Appellees approve and adopt as the Jurisdictional Statement and Statement of the Case the Preliminary Statement in the Brief for the District of Columbia, pp. 1-2.

SUMMARY OF ARGUMENT

The clear and unambiguous language of Section 932, Act of March 3, 1901 (31 Stat. 1189, 1340, ch. 854; D.C. Code 1961, §23-101), by virtue of Sections 1 and 1640 of said Act (31 Stat. 1189 and 1436, ch. 854; D.C. Code 1961, §49-301), determines that prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is more than a fine only, or imprisonment not exceeding one year shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants. This language supersedes the earlier provision in Section 18 of the Act of June 29, 1892 (27 Stat. 322, ch. 320) that all prosecutions for violations of any of the provisions of any of the laws or ordinances provided for by this act (i.e. Act of July 29, 1892)--which included in its Sections 5 and 6 what is now amended and codified as D.C. Code, 1961, §22-1107--shall be conducted in the name of and for the benefit of the District of Columbia. D.C. Code, 1961, §22-1107 provides for maximum punishment of $250.00 or imprisonment of ninety days, or both, clearly beyond the statutory authority for prosecution in the name of the District of Columbia or by the Corporation Counsel.

Therefore, proper construction of the pertinent statutes dictates that prosecutions for violations of D.C. Code, 1961,

§22-1107 must be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants. This construction of these statutory provisions consistently has been made by this Court and as recently as July 27, 1967, in Smith v. District of Columbia, (No. 20,279) ____ U.S. App. D.C. _____, _____ F. 2d _____.

ARGUMENT

I

D.C. Code, 1961, §23-101, clearly and without ambiguity, prescribes the basis for determining which prosecutions for violations of police or municipal ordinances or regulations and penal statutes in the nature of police or municipal regulations shall be conducted in the name of the District of Columbia and by the Corporation Counsel or his assistants, and which in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants, and by application of this standard consistent with the pertinent rules of statutory construction, prosecutions for violations of D.C. Code, 1961, §22-1107 must be conducted in the name of the United States and by the attorney of United States for the District of Columbia or his assistants, D.C. Code, 1961, §22-109 to the contrary notwithstanding.

There is unusual clarity and unambiguity in the language of the statutory provision with which the Congress, enacting for the first time a code of laws for the District of Columbia, delineated in whose name and by whom criminal prosecutions in the District of Columbia would be conducted. The simple and easily applied standard is set forth in Section 932, Act of March 3, 1901 (31 Stat. 1340; D.C. Code, 1961, §23-101), providing that criminal prosecutions,

> ...where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants. (Emphasis added.)

As a part of this same Act of March 13, 1901, in obvious recognition of the fact that the code of laws

thereby enacted might omit previously enacted laws applicable to the District of Columbia which the Congress did not intend to repeal by such omission, Congress included a saving clause; but express exception was made against saving "...any municipal ordinance or regulation...in so far as the same may be inconsistent with, or is replaced by some provision of this code." (31 Stat. 1189 and 1436, ch. 854; D.C. Code, 1961, §49-301).

Accordingly, to the extent that Section 18 of the Act of July 29, 1892 (27 Stat. 325, ch. 320; D.C. Code, 1961, §22-109), providing that "...prosecutions for violations of ...any of the provisions of any of the laws or ordinances provided for by this Act [including §§ 5 and 6 thereof what is now amended and codified as D.C. Code, 1961, §22-1107] shall be conducted in the name of and for the benefit of the District of Columbia," is inconsistent with Section 932 of the Act of March 3, 1901 (31 Stat. 1340, ch. 854), providing that the determination as to in whose name and by whom criminal prosecutions shall be conducted is to be made solely by reference to the maximum penalty imposed for the particular offense, Section 18 of the Act of July 29, 1892 was repealed or "replaced" by the provision of the Act of March 3, 1901.

The classic statement of the rule of statutory construction applicable here is set forth by Mr. Justice Brown in Hamilton v. Rathbone, 175 U.S. 414, 419 (1899),

coincidentally involving the construction of statutes applicable to the District of Columbia, as follows:

> The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, and the purpose intended to be accomplished by it, to determine its proper construction. <u>But where the act is clear upon its face, and when standing alone is fairly susceptible of but one construction that construction must be given to it.</u> Heydon's case, 3 Fed. Rep. 76;
>
> * * *
>
> ...The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to solve, but not to create an ambiguity ...[Id., at 421] (Emphasis added).

Each of Sections 1, 932, and 1640 of the Act of Mar. 3, 1901 is "clear upon its face and when standing alone is fairly susceptible of but one construction," the cumulative effect of which is--that criminal violations in the District of Columbia in which the maximum punishment is $250.00 fine or imprisonment for one year, or both, are to be prosecuted in the name of the United States for the District of Columbia or his assistants and any prior inconsistent provisions of law are replaced thereby--and that construction must be given to these sections of the Act of March 3, 1901.

Therefore, properly construed and applied, the pertinent statutory provisions dictate that prosecutions for violations of D.C. Code, 1961, §22-1107, for which

the maximum punishment is a fine of $250.00, or 90 days imprisonment, or both, must be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants.

II

This Court, in a consistent line of decisions since 1910 and as recently as July 27, 1967, has held that the issue of whether criminal prosecutions in the District of Columbia shall be conducted in the name of the District of Columbia or United States, and by the corporation counsel and his assistants or by the attorney of the United States for the District of Columbia and his assistants, respectively, is determined solely by reference to Section 932, Act of March 3, 1901 (Stat. 1340, ch.854), pursuant to which prosecutions for violations of D.C. Code, 1961, §22-1107 must be in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants.

As early as 1910, this Court, in Nation v. District of Columbia, 34 App. D.C. 453, although reversing on other jurisdictional grounds the appellant's conviction for violation of one of the provisions of the Act of July 29, 1892 (27 Stat. 322, ch.320) as amended to provide a maximum penalty of fine or imprisonment, or both which act also included the provisions which have become D.C. Code, 1961, §§22-1107 and 22-109, involved here, presaged the position which consistently has been followed when the issue has arisen. Mr. Chief Justice Shepard, delivering the opinion of the Court, commented:

> For a like reason, it is unnecessary to determine whether, had the property been of less value than $35.00, a prosecution could have been maintained in the name of the District of Columbia. It may be added, however, that it is very doubtful if such a prosecution could be maintained under sec. 932 of the Code (31 Stat. at L. 1340, chap. 854), which provides that prosecutions for violations of "all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia, and by the city solicitor or his assistants." (34 App. D.C. 453, 457-458).

The issue here was first considered by this Court, under the same certification procedure and jurisdiction as is here invoked, in District of Columbia v. Simpson, 40 App. D.C. 498 (1913). There the question of prosecution authority and responsibility involved sec.878c of the District Code, which prohibited, inter alia,

> ...the refilling with milk, cream, or other beverage, with intent to sell the same, any vessel previously registered by another, etc. The penalty for the first offense is "a fine of not less than fifty cents for each such vessel, or by imprisonment for not less than ten days nor more than one year, or both such fine and imprisonment; and for each subsequent offense by a fine of not less than one year, or both such fine and imprisonment." (40 App. D.C. 498, 499)

This Court, citing the standard set out in Section 932 of the Act of March 3, 1901 (31 Stat. 1340, ch.854), held that:

> ...So here, the statute having expressly limited the authority of the corporation counsel to prosecute in the name of the District of Columbia offenses punishable by fine only, or by imprisonment not exceeding one year, he has no authority to prosecute offenses where the maximum punishment may be both a fine and imprisonment. This was intimated in Nation v. District of Columbia, 34 App. D.C. 453.

It is significant to note the concluding sentence in this Court's opinion in the Simpson case, which is peculiarly apposite to the instant case:

> ...If it is deemed advisable to have such prosecutions [for violations of sec. 878c] conducted by the corporation counsel or his assistants, congressional action must be sought. We must take the statutes as we find them.

Thus, in United States v. Strothers, 97 U.S. App. D.C. 63, 228 F.2d 34 (1955), this Court again dealt with the issue involved here. There the question certified to this Court was whether prosecutions for "soliciting for prostitution, etc." in violation of Section 1 of Act of August 15, 1935, as amended (49 Stat. 651, 652; 62 Stat. 346, Title I, §102; 67 Stat. 92, 93; D.C. Code, 1951, §22-2701), must be in the name of the United States or the District of Columbia and by the United States Attorney or Corporation Counsel for the District of Columbia and his assistants, respectively.

The predecessor of Section 1 of the Act of August 15, 1935, as amended, was Section 7 of the Act of July 29, 1892, and from the date of its enactment, pursuant to Section 18 thereof, the Corporation Counsel and his predecessors prosecuted cases arising thereunder. The Act of August 15, 1935 also increased the maximum penalty from a fine of twenty-five dollars if the person solicited were an adult or fifty dollars if the person were a minor to a fine of not more than $100.00 or imprisonment for not more than ninety days, or both, and, thereafter, prosecutions were by the United States Attorney in the name of the United States. This Court's holding in Strothers, consistent with its holding in Simpson, supra was as follows:

> In view of the fact that the penalty prescribed by the 1935 Act as amended is a fine or imprisonment or both, the prosecution is to be conducted by the United States Attorney, unless the

> Corporation Counsel has been specifically authorized to do so. As heretofore indicated, no such specific authority has been given (228 F.2d 34,37).

The issue here was next before this Court in District of Columbia v. Moody, 113 U.S. App. D.C. 67, 304 F.2d 943 (1962). There this Court was called upon to decide the certified question "whether the offense of destroying private property, in violation of D.C. Code §22-3112 (1961), should be prosecuted by the Corporation Counsel of the District of Columbia." Significantly, D.C. Code, 1961, §22-3112 is the codification of Section 1 of the Act of July 29, 1892 (27 Stat. 322, ch. 320), the same Act creating the criminal offense here involved (Sections 5 and 6, 27 Stat. 323, ch.320) and prescribing that "all prosecutions for violations of any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name of and for the benefit of the District of Columbia" (Section 18, 27 Stat. 325, ch.320). However, this Court in a per curiam opinion held simply that:

> ...Inasmuch as violations of Section 22-3112 are, to quote the Section as amended, presently punishable by "fine not to exceed one hundred dollars, or imprisonment" (emphasis added), we think that by reason of D.C. Code §23-101 prosecuted under Section 22-3112 must be conducted by the United States Attorney for the District of Columbia. See United States v. Strothers, 97 U.S. App. D.C. 63, 228 F.2d 34 (1955) (Emphasis added).

The words "presently punishable" are emphasized, supra, because it is obvious that this Court was aware in

Moody, as it was in Nation, Simpson and Strothers that the maximum penalty presently prescribed for violation of the code section involved resulted from an increase, by amendment subsequent to its original enactment, to a fine or imprisonment, or both, thereby invoking application of the standard prescribed in D.C. Code, 1961, §23-101.

Finally, in Smith v. District of Columbia, _____ U.S. App. D.C., _____F.2d _____, (No. 20,279, decided July 27, 1967) this Court had before it an appeal from a decision by the District of Columbia Court of Appeals (219 A.2d 842, decided June 16, 1966. The question here had been raised as a jurisdictional issue, on appeal from appellants' conviction in a prosecution by the Corporation Counsel in the name of the District of Columbia which appellants contended was for violation of D.C. Code, 1961, §23-101 and the authority of Moody, supra, should have been prosecuted by the United States Attorney in the name of the United States. Neither the trial court nor the District of Columbia Court of Appeals certified the jurisdictional question to this Court, as provided by D.C. Code, 1961, §23-102. However, the District of Columbia Court of Appeals found that the prosecutions were for disorderly conduct in violation of D.C. Code, 1961, §22-1121, rather than §22-1107, and held that:

> ...While the informations in the present case charge an offense punishable by a fine or by imprisonment, or both, §22-109, D.C. Code, 1961, specifically provides that all prosecutions

> for violations of §22-1121 shall be conducted in the name of and for the benefit of the District of Columbia in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the District of Columbia. Thus the Moody decision has no application here, and we hold the charges of disorderly conduct were properly prosecuted by the Corporation Counsel. (219 A.2d 842, 844-845).

This Court vacated the judgment of the District of Columbia Court of Appeals and remanded the case to that court with instructions to set aside the judgments of conviction and in doing so stated:

> We note in this case, as we did in the Feeley case, supra, that the Capitol Grounds Act was not here invoked. Also, here as there we do not reach any constitutional questions and we do not attempt to solve any questions of statutory construction. The decision rests upon the procedure. (Slip Opinion, p. 5)

However, Senior Circuit Judge Prettyman, speaking for the Court,at page 2 of the Slip Opinion, says:

> We believe the development of the problem will be clearer if we first examine the several statutory provisions involved.

and, after setting out the provisions of D.C. Code, 1961, §23-101, says:

> Thus we long ago held that where the maximum punishment may be both a fine and imprisonment the corporation counsel has no authority to prosecute.[2] [citing District of Columbia v. Simpson, 40 App. D.C. 498 (1913)]

Judge Prettyman then proceeds to set out pertinent parts of D.C. Code, 1961, §§22-1121, 22-109, and 22-1107 and

following an analysis of §22-1107, says:

> ...The penalty here provided is both fine and imprisonment. So far as we are advised, there is no specific exemption of this section from the requirements of 23-101, such as was provided in respect to Section 1121.

Thus, a synthesis of this Court's decisions in a consistent line from February 10, 1910 to July 27, 1967, is that: pursuant to D.C. Code, 1961, §23-101, prosecutions for criminal offenses in the District of Columbia, where the maximum punishment may be both a fine and imprisonment, shall be conducted in the name of the United States and by the United States Attorney for the District of Columbia or his assistant; the corporation counsel has no authority to prosecute such offenses except where a specific exemption from the requirements of D.C. Code, 1961, §23-101 is provided; and the Court is advised of no such exemption of D.C. Code, 1961, §22-1107.

CONCLUSION

In the light of the foregoing, it is respectfully submitted that the pertinent statutory provisions, as consistently construed and applied by this Court, compel the conclusion that prosecutions for violations of D.C. Code, 1961, §22-1107 must be conducted in the name of the United States by the attorney of the United States for

the District of Columbia or his assistants.

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797-1582

CERTIFICATE OF SERVICE

Service and receipt of copies of the foregoing Brief for Appellees hereby are acknowledged this _____ day of October, 1967.

CHARLES T. DUNCAN, CORPORATION COUNSEL, D.C.

By _____
Assistant Corporation Counsel
Attorney for Appellant

DAVID G. BRESS, UNITED STATES ATTORNEY, D.C.

By _____
Assistant United States Attorney

BRIEF FOR UNITED STATES OF AMERICA
AMICUS CURIAE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 21,311 12-13 and 21,314

DISTRICT OF COLUMBIA

v.

MARION BARRY, JR., ET AL.

BRIEF IN RESPONSE TO QUESTION CERTIFIED BY
DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
LAWRENCE LIPPE,
Assistant United States Attorneys,
For United States of America Amicus
Curiae.

QUESTION PRESENTED

Whether a prosecution for using profane language, indecent and obscene words and engaging in loud and boisterous talking and other disorderly conduct, in violation of Section 22-1107 of the District of Columbia Code, should be conducted by the United States, or by the Corporation Counsel, in the name of and for the benefit of the District of Columbia.

I N D E X

TABLE OF CASES

OTHER REFERENCES

UNITED STATES COURT OF APPEALS
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Nos. 21,311 - 21,314

DISTRICT OF COLUMBIA

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MARION BARRY, JR., ET AL.

BRIEF IN RESPONSE TO QUESTION CERTIFIED BY
DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

BRIEF FOR UNITED STATES OF AMERICA
AMICUS CURIAE

STATEMENT OF THE CASE

By separate informations filed by the Corporation Counsel for the District of Columbia in the Court of General Sessions, Messrs. Marion S. Barry, Jr., et al. were charged with disorderly conduct in violation of Section 22-1107, District of Columbia Code.

On September 1, 1967, upon motion by defendants, the trial court dismissed each of the informations on the ground, inter alia, that the prosecutions should have been conducted by the United States. On September 20, 1967, the trial court, upon motion by the Corporation Counsel, vacated that portion of its dismissal order which dealt with prosecutional authority and

certified the question to this Court under the provisions of Section 23-102, District of Columbia Code.

STATUTES INVOLVED

Act of July 29, 1892 (27 Stat. 323) provided in pertinent part:

> Section 5. That it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or any indecent or obscene words, or engage in any disorderly conduct in any street, avenue, public space, square, road, or highway, or at any railroad depot or steamboat landing within the District of Columbia, or in any place wherefrom the same may be heard in any such street, avenue, alley, public square, road, highway, or in any such depot, railroad cars, or on board any steamboat, under a penalty of not exceeding twenty dollars for each and every such offense.
>
> Section 6. That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble at the corners of any of the streets or avenues, or in any street, avenue, or alley, road, or highway, or on the foot pavements or flag footways of any street or avenue, or at the entrance or on the steps, cellar doors, porches, or porticos of any public or private building or office, or at the entrance of any public or private building or office, or at the entrance, or in, on, or around any of the inclosures of the Capitol, Executive Mansion, public squares, District buildings, Judiciary square, or at the entrance of any church, schoolhouse, theater, or any assembly room, or in or around the same, or any other public or private inclosure within the said District, and be engaged in loud or boisterous talking, or to insult or make rude or obscene comments or remarks or observations on persons passing by the same, or in their hearing, or to so crowd, obstruct, or incommode the said foot pavement or flag footway, or the entrance into or out of any such church, public or private dwelling, city hall, Executive Mansion, Capitol, or such public inclosure, square or alley, highway or road, as to prevent the free and uninterrupted passage thereof, under a penalty of not more than twenty-five dollars for each and every such offense.
>
> Section 18. That all prosecutions for violations of any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as now provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of any of the provisions of this act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the workhouse in the District of Columbia for a term nor exceeding six months for each and every offense.

Act of July 8, 1898 (30 Stat. 723) provided in pertinent part:

> That an Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia," approved July twenty-ninth, eighteen hundred and ninety-two, be, and the same is hereby, amended to read as follows: * * *
>
> That said Act be further amended by striking out sections five and six and inserting in lieu thereof the following:
>
> "That it shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; that it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than twenty-five dollars for each and every such offense."

Act of June 29, 1953 (67 Stat. 97) provided in pertinent part:

> Section 210. Section 6 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia", approved July 29, 1892, as amended (D.C.Code, sec. 22-1107, relating to unlawful assembly, profane and indecent language), is amended by striking out "twenty-five dollars" and inserting in lieu thereof "$250 or imprisonment for not more than ninety days, or both".
>
> Section 211. (a) Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby,-

(1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

(2) congregates with others on a public street and refuses to move on when ordered by the police;

(3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;

(4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than ninety days, or both.

(b) Section 18 of the Act entitled "An Act for the preservation of the public peace and the protection of property within the District of Columbia", approved July 29, 1892 (D.C. Code, sec. 22-109), is amended by inserting "section 211 of the District of Columbia Law Enforcement Act of 1953 or" after "violations of" and after "convicted of any violation of".

Title 22, District of Columbia Code, Section 109, provides:

All prosecutions for violations of section 22-1121 or any of the provisions of any of the laws or ordinances provided for by this Act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of section 22-1121 or any of the provisions of this Act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the workhouse of the District of Columbia for a term not exceeding six months for each and every offense. The second sentence of this section shall not apply with respect to any violation of section 22-1112 (b). (July 29, 1892, 27 Stat. 325, ch. 320, § 18; June 29, 1953, 67 Stat. 93, 98, ch. 159, §§ 202 (a)(2), 211 (b).)

Title 22, District of Columbia Code, Section 1107, provides:

> It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservations, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both for each and every such offense. (July 29, 1892, 27 Stat. 323, ch. 320, § 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159, § 210.)

Title 22, Dictrict of Columbia Code, Section 1121, provides:

> Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby -
>
> (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
>
> (2) congregates with others on a public street and refuses to move on when ordered by the police;
>
> (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons;
>
> (4) interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in the proximity of such person's pocketbook, or handbag; or

(5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees,

shall be fined not more than $250 or imprisoned not more than ninety days, or both. (June 29, 1953, 67 Stat. 98, ch. 159, § 211a.)

Title 23, District of Columbia Code, Section 101, provides:

The attorney for the District of Columbia shall be known as the corporation counsel.

Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the corporation counsel or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney of the United States for the District of Columbia or his assistants. (Mar. 3, 1901, 31 Stat. 1340, ch. 854, § 932; June 30, 1902, 32 Stat. 537, ch. 1329.)

Title 23, District of Columbia Code, Section 102, provides:

If in any case any question shall arise as to whether under section 23-101 the prosecution should be conducted by the corporation counsel or by the attorney of the United States for the District of Columbia, the presiding justice shall forthwith, either of his own motion or upon suggestion of the corporation counsel or the attorney of the United States, certify the case to the United States Court of Appeals for the District of Columbia, which court shall hear and determine the question in a summary way. In every such case the defendant or defendants shall have the right to be heard in the United States Court of Appeals for the District of Columbia. The decision of such court shall be final.

ARGUMENT

I. When Congress enacted the "District of Columbia Law Enforcement Act of 1953" it clearly intended that prosecutions for disorderly conduct in violation of 22 D.C. Code §§ 1107 and 1121 be conducted by the Corporation Counsel in the name of and for the benefit of the District of Columbia.

a. Legislative History

On July 29, 1892, Congress passed an "Act for the Preservation of the Public Peace and the Protection of Property Within the District of Columbia,"[1/] wherein eighteen substantive offenses were enumerated. Sections 5 and 6 of the Act proscribed the type of disorderly conduct involved in this case and provided that violations would be punishable by a fine of $25. Section 18 of the same statute provided that all prosecutions for violations of the enumerated offenses "be conducted in the name of and for the benefit of the District of Columbia," and was subsequently codified in 22 D.C. Code § 109. In 1898, Sections 5 and 6 of the 1892 Act were merged into one section[2/] which was subsequently codified in 22 D.C. Code § 1107.

In 1901, the present Code of Laws of the District of Columbia was adopted and Congress included therein a provision to

1/ 27 Stat. 322 (1892).

2/ 30 Stat. 723 (1898). There were some substantive amendments which are not here pertinent.

the effect that "all acts of Congress * * * in force at the time of the passage of this act shall remain in force" unless inconsistent with or replaced by that Code.[3/] The Code contained no provision inconsistent with or in any way repealing or amending the 1892 Act. Thus it remained in full force and effect.

Another section of the 1901 Code (Section 932) provided that:

> Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia and by the city solicitor 4/, or his assistants. All other criminal prosecutions shall be conducted in the name of the United States and by the attorney for the United States for the District of Columbia or his assistants. 5/

This Section has been construed to mean that where the maximum punishment permitted by statute is both fine and imprisonment, prosecution should be brought in the name of the United States by the United States Attorney. District of Columbia v. Simpson, 40 App. D.C. 498 (1913); Smith, et al., v. District of Columbia, D.C. Cir. No. 20279, decided July 27, 1967.

On June 29, 1953, Congress enacted the "District of Columbia Law Enforcement Act of 1953."[6/] Section 211(a) of this

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3/ Section 1, 31 Stat. 1189 (1901).

4/ A 1902 amendment changed the words "city solicitor" to "corporation counsel." 32 Stat. 537 (1902).

5/ 31 Stat. 1340, now 23 D.C. Code § 101.

6/ 67 Stat. 90 (1953).

Act created a new category of disorderly conduct proscriptions and provided that violators would be "fined not more than $250 or imprisoned not more than ninety days, or both."[7] Section 211(b) of the same Act amended Section 18 of the Act of 1892 by bringing the newly created proscriptions of Section 211 of the 1953 Act within the provisions of Section 18.[8] Section 210 of the 1953 statute amended Section 6 of the 1892 Act by increasing the penalties for violations thereunder to a fine of not more than $250 or imprisonment of not more than ninety days, or both.[9]

b. Legislative Intent

In passing the "District of Columbia Law Enforcement Act of 1953" Congress intended, inter alia, to strengthen the existing disorderly conduct law and create an even greater category of proscribed disorderly acts. This is readily apparent on the face of those portions of the Act dealing with disorderly conduct. By increasing the penalties to include a fine, imprisonment, or both, for violations of the already existing disorderly statute[10] and creating a new disorderly statute with similar penalties,[11] Congress obviously sought to establish a meaningful deterrent to such conduct.

7/ 67 Stat. 98 (1953). Codified in 22 D.C. Code 1121.

8/ Codified in 22 D.C. Code § 109.

9/ Codified in 22 D.C. Code § 1107.

10/ 22 D.C. Code § 1107.

11/ 22 D.C. Code § 1121.

It is presumed that whenever the legislature enacts a new statutory provision it is cognizant of the existence of all legislative policy embodied in prior Acts. Accordingly, construction of the 1953 statute together with the original Act of 1892 leads to the conclusion that prosecution of the disorderly conduct dealt with in both Acts is within the jurisdiction of the Corporation Counsel. However it is argued by the defendants below that Section 932 of the 1901 Code[12/] with its mandate concerning offenses entailing a maximum punishment of both fine and imprisonment requires that violations of Section 1107 disorderly conduct be prosecuted by the United States Attorney. Congress, too, was apparently aware of Section 932 and displayed its awareness when it specifically excepted prosecutions arising under the newly created disorderly statute from the Section 932 mandate and thereby vested prosecutorial authority in the Corporation Counsel.[13/] Defendants argue, however, and it is suggested by way of dictum in Smith, et al. v. District of Columbia, supra, that Congress failed to exempt disorderly prosecutions under 22 D.C. Code § 1107, as amended, from the requirements of Section 932. In weighing the effect of the 1953 amendment of Section 1107, it must be borne in mind that the Corporation Counsel had been specifically charged with the prosecution of the offense by Section 18 of the 1892 Act.

12/ 23 D.C. Code § 101.

13/ See Section 211(b) of the Act of 1953, 67 Stat. 98 (1953). Codified in 22 D.C. Code § 109.

Congress is presumed to intend to achieve a consistent body of law,[14] and in the absence of an expressed intention on the part of Congress that prosecution should shift to the United States or total legislative silence regarding prosecutive authority, it cannot be presumed that by increasing the penalty for disorderly conduct under Section 1107, it thereby intended to effectuate a change of the existing law which vested prosecution in the District of Columbia. Since it is apparent that 22 D.C. Code § 109 encompasses the substantive provisions of the 1892 Act, which, of course, include disorderly conduct as codified in 22 D.C. Code § 1107, there was no need for Congress to redundantly vest the Corporation Counsel with prosecutive authority it already had.[15] It is significant that when Congress created the new disorderly conduct statute in 1953,[16] it specifically provided that the Corporation

14/ Sutherland, Statutory Construction, Sec. 2002 (3rd Ed. 1943).

15/ 22 D.C. Code § 109 provides, in pertinent part:

> "All prosecutions for violations of Section 22-1121 or any of the provisions of any of the laws or ordinances provided for by this Act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District."

"[T]his Act" clearly refers to the Act of 1892. See Smith, et al. v. District of Columbia, supra.

16/ 22 D.C. Code 1121.

Counsel be the prosecutor for violations thereunder.[17] Congress thereby recognized that the offense of disorderly conduct is in the category of minor offenses, prosecution of which has been traditionally under the jurisdiction of the Corporation Counsel. Congress declared, in effect, that notwithstanding the penalties now provided for violations of the newly created and amended disorderly statutes, the Corporation Counsel should be the prosecutor.

The question of prosecutorial authority is not new in the District of Columbia. In a related but distinguishable situation, this Court, in United States v. Strothers, 97 U.S. App. D.C. 63, 228 F.2d 34 (1955), ruled that the United States Attorney was the proper prosecuting authority for the offense of soliciting prostitution, which was originally proscribed by Section 7 of the 1892 Act. Until 1935, the Corporation Counsel prosecuted the offense. In 1935, Congress repealed Section 7 of the 1892 Act, broadened the proscriptions against prostitution and increased the penalty thereunder to a maximum fine of $100 or imprisonment for not more than ninety days, or both.[18] After the passage of the 1935 Act violations thereunder were conducted by the United States Attorney in accordance with 23 D.C. Code § 101. In 1953 Congress increased the penalty for violation of the 1953 soliciting

17/ Since Section 18 of the 1892 Act did not apply, specific statutory exemption from the mandate of 23 D.C. Code § 101 was necessary.

18/ 49 Stat. 651 (1935).

statute.[19] This Court, noting that the 1935 Act repealed Section 7 of the 1892 Act, declared that had Congress intended that the Corporation Counsel prosecute the soliciting offense, notwithstanding 22 D.C. Code § 101, it would have so indicated in the 1953 Act as it did "with respect to proper prosecution of the offense of disorderly conduct."[20] In District of Columbia v. Moody, 113 U.S. App. D.C. 67, 304 F.2d 943 (1962), the same controversy was presented to this Court and there involved the offense of destroying property which was created by Section 1 of the Act of 1892.[21] A subsequent amendment increased the penalty for violations of Section 1 to include a fine, imprisonment, or both.[22] Congress was silent regarding the issue of prosecutive authority. Again, this Court ruled that 22 D.C. Code § 101 was controlling and that the United States Attorney should be the prosecutor.

The common denominator apparent in the legislative facts in Strothers and Moody is the absence in the respective repealing

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19/ 67 Stat. 92, 93 (1953). This, of course, is the same Act that dealt with the disorderly conduct provisions here in issue.

20/ United States v. Strothers, supra at 66, 228 F.2d at 37.

21/ Codified in 22 D.C. Code § 3112.

22/ 34 Stat. 126 (1906).

and amending legislation of any specific provision with respect to prosecutive authority. Thus, this Court reasoned in each case that Congress intended that the more general provision regarding prosecutive authority[23] should prevail.[24] However, Congress was not silent in this regard when it amended 22 D.C. Code § 1107. On the same day that it amended Section 1107 by increasing the penalties thereunder, Congress enacted a new and additional disorderly statute[25] with similar penalties and expressed also its intention that the Corporation Counsel be the prosecutor. This Court acknowledged the obvious intent of Congress regarding prosecutive authority when it stated in Strothers, supra at 66, 228 F.2d at 37:

> What Congress did in this respect is to be found in Section 211 of the 1953 Act, which directly amends Section 18 of the 1892 Act with respect to proper prosecution of the offense of disorderly conduct. (Emphasis added.)

"[T]he offense of disorderly conduct" clearly encompasses the proscriptions found in Sections 1121 and 1107. A contrary legislative intent would be inconceivable.

23/ 23 D.C. Code § 101.

24/ In short, we do not believe that this Court in Strothers meant to rule out means other than repeal whereby Congress could effect a shift in prosecutive authority. An amendment of existing legislation with accompanying silence with respect to prosecutive authority could cause the same result, as it did in Moody.

25/ 22 D.C. Code § 1121.

II. Practical considerations make inescapable the conclusion that the Corporation Counsel is the proper prosecuting authority for violations of 22 D.C.Code § 1107.

The offense here in question has been prosecuted by the Corporation Counsel for the last seventy-five years. After the adoption of the 1953 Act, the prosecuting officials concerned interpreted the statutory scheme as continuing to vest authority in the Corporation Counsel to prosecute in the field of disorderly conduct. The construction placed upon a statute by the officials charged with its administration is entitled to considerable weight. Sutherland, Statutory Construction, Sec. 5103 (3d Ed. 1943). We note that the compilers of the District of Columbia Code have throughout the years arrived at the same conclusion as to the officials charged with prosecution. The recent 1967 edition of the Code lists Section 1107 as one of the sections prosecution for violations of which "shall be conducted in the name of and for the benefit of the District of Columbia," and the compiler lists that section very pointedly in his notes. See 22 D.C. Code § 109.

The subject matter of the statute is another aid in determining the proper prosecutor. The offense in question is of that category of minor offenses, prosecution of which traditionally has been under the jurisdiction of the Corporation Counsel.

CONCLUSION

WHEREFORE, it is respectfully submitted that prosecutions for violations of 22 D.C. Code § 1107 should be conducted by the Corporation Counsel, in the name of and for the benefit of the District of Columbia.

/s/ DAVID G. BRESS
DAVID G. BRESS
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ LAWRENCE LIPPE
LAWRENCE LIPPE
Assistant United States Attorney

Attorneys, For United States of America Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been mailed to Corporation Counsel and Frank D. Reeves, Esquire, Howard University Law School, Post Office Box 1121, Washington, D. C. 20001, this 9th day of October, 1967.

/s/ LAWRENCE LIPPE
LAWRENCE LIPPE
Assistant United States Attorney